NKM TRADING SDN. BHD.

v.

BANK BURUH (M) BHD.

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[SUIT NO. C1259 OF 1985]
16 OCTOBER 1990

COMPANY LAW: *Holding and subsidiary company - Eleven bills drawn by subsidiary company credited to holding company's account at defendant bank - Authorisation - Outstanding facility - Same managing director - Separate legal entity.*

The plaintiff company NKM Trading Sdn. Bhd. operated a current account at the defendant bank, BB. NKM's Trading Sdn. Bhd. overseas buyers had made certain large sums of payments to BB which had not been credited to NKM's account; as a result NKM sent a letter of demand to BB for the said amounts. BB contended that these sums were duly endorsed by NKM Trading Sdn. Bhd. to BB and that these amounts were credited to the outstanding account of NKM Holding Sdn. Bhd. (the holding company) to settle the amounts advanced by BB towards account of the outstanding facility; they further alleged that this was done at NKM's request, *vide* letter by K, the managing director of both companies. The Senior Assistant Registrar had refused the plaintiff application for summary judgment under O. 14 of the Rules of the High Court 1980; the plaintiff appeals.

Held:

[1] There is no evidence that the plaintiff had authorised the defendant to credit the said bills to the account of NKM Holdings Sdn. Bhd. in 1979.

[2] Since the defendant was only authorised to credit all bills negotiated under NKM Trading Sdn. Bhd. to the account of NKM Holding Sdn. Bhd. on 3 March 1980, the defendant had credited the eleven bills to NKM Holdings Sdn. Bhd. without any authorisation by the plaintiff.

[3] Both NKM Trading Sdn. Bhd. and NKM Holdings Sdn. Bhd. are two separate companies each having its own memorandum and articles of association. NKM Trading Sdn. Bhd. may be a subsidiary of NKM Holdings Sdn. Bhd. and Mr. Krishnamurthy may be the managing director in both companies but in law both companies are two separate entities.

[Appeal allowed.]

Cases referred to:
Bank Bumiputra Malaysia Bhd. & Anor. v. Lorrain Osman & Ors [1985] CLJ (Rep) 409
Aspatra Sdn. Bhd. & 21 Ors. v. Bank Bumiputra Malaysia Bhd. & Anor. [1987] CLJ (Rep) 50
People's Insurance Co. (M) Sdn. Bhd. v. People's Insurance Co. Ltd. & Ors. [1986] 1 MLJ 68

Legislation referred to:
Rules of the High Court 1980, O. 14

For the plaintiff/appellant - M.S. Murthi; M/s. Murthi & Partners
For the defendant - K.L. Rekhraj; M/s. K.L. Rekhraj

JUDGMENT

Zakaria Yatim J:

This is an appeal by the plaintiff against the decision of the Senior Assistant Registrar refusing the plaintiff's application for summary judgment under O. 14 of the Rules of the High Court 1980.

The plaintiff is a company incorporated in Malaysia with its registered office at Suite EF, 17th Floor, Bangunan Angkasa Raya, Jalan Ampang, Kuala Lumpur. The defendant is a commercial bank licenced under the Banking Act with its office at Ground Floor, Bangunan Kuwasa, Jalan Raja Laut, Kuala Lumpur.

In its statement of claim the plaintiff averred that at all material times, it was a customer of the defendant bank and operated a current account No. 55-5464. At the material times, the plaintiff's overseas buyers had paid to the credit of the plaintiff a large sum of money on account of its trading transactions. Amongst the payments made by the plaintiff's overseas buyers to the defendant bank was a total sum of US$336,657.90 and another RM153,557 which had not been credited to the plaintiff's account. The particulars of the sums not credited to the plaintiff's account were stated in para. 6 of the statement of claim. Paragraph 6 of the statement of claim states as follows:

6. Particulars

Serial No.	OBC No.	Date	Amount
1.	79146	25 September 1979	US$ 47,360.00
2.	79147	25 September 1979	US$ 54,934.40
3.	79148	25 September 1979	US$ 53,440.00
4.	79150	25 September 1979	US$ 52,541.06
5.	79153	27 September 1979	US$ 10,933.29
6.	79154	27 September 1979	US$ 6,762.15
7.	79155	27 September 1979	US$ 5,653.96
8.	79156	27 September 1979	US$ 4,093.20
9.	79162	27 November 1979	US$ 75,162.04
10.	79163	14 December 1979	US$ 25,777.80
			US$336,657.90
11.	79166	24 December 1979	RM153,557.00

The plaintiff alleged that the total sum of money stated in para. 6 had been duly received by the defendant bank but had not been credited to the plaintiff's account. The plaintiff averred that on 18 March 1985 it caused a letter of demand in respect of the sum of US$336,657.90 and RM153,557 to be sent to the defendant bank asking the defendant to pay within forty-eight hours upon the receipt of the letter of demand. According to the plaintiff the defendant failed, neglected and/or refused to pay the said sum. The plaintiff's claim is therefore for the sum of US$336,657.90 and RM153,557 plus interest at the rate of 8% from 25 September 1979 to the date of full realisation and cost.

The defendant in its statement of defence denied all the allegations made by the plaintiff in the statement of claim. The defendant however admitted receiving the money but averred that the bills were duly endorsed by the plaintiff to the defendant bank from time to time

and the proceeds recovered therefrom were duly credited to the outstanding account of NKM Holding Sdn. Bhd. (hereinafter referred as the "holding company"). The defendant further averred that the plaintiff and its holding company were trustees, agents and bailees of the defendant bank for all the goods and merchandise covered by the bills and in particular the eleven bills referred to in para. 6 of the statement of claim. The realised proceeds of the said eleven bills were duly credited to the holding company's account to settle and/or pay off the amounts advanced by the defendant bank towards account of the outstanding facility. The defendant stated that the plaintiff had endorsed the bills of lading and the titles of the goods to the defendant bank at the time tendered and had therefore discharged the goods to the defendant. The defendant averred that the proceeds from the payment of the said eleven bills by the overseas buyers were used to settle the account of the holding company at the request of the plaintiff.

In his affidavit affirmed on behalf of the defendant on 8 May 1985, Mr. Lam Yik Meng averred that the plaintiff had transferred the eleven bills to NKM Holdings Sdn. Bhd. and had authorised the defendant to credit the proceeds of the eleven bills to the account of NKM Holdings Sdn. Bhd. In his subsequent affidavit affirmed on 12 September 1985, Mr. Lam Yik Meng averred that on 3 March 1980, a letter was written by Mr. Krishnamurthy, the managing director of the plaintiff to the defendant authorising the defendant to credit all bills negotiated under NKM Trading Sdn. Bhd., that is the plaintiff, to the account of NKM Holdings Sdn. Bhd. The letter dated 3 March 1980 is exhibited to the affidavit. The letter reads as follows:

> The Manager,
> Bank Buruh (M) Bhd.
> Jalan Gereja,
> Kuala Lumpur.
>
> Dear Sirs,
>
> Transfer of bills negotiated from NKM Trading Sdn. Bhd. to NKM Holdings Sdn. Bhd.
>
> We hereby authorise you to credit all bills negotiated under NKM Trading Sdn. Bhd. to the account of NKM Holdings Sdn. Bhd.
>
> Yours faithfully,
> NKM Trading Sdn. Bhd.
>
> Sgd.
> Krishnamurthy
> (Managing Director).

From the documents exhibited to the affidavit of Mr. Soosai s/o Pappu, affirmed on behalf of the plaintiff on 27 March 1985, all the eleven bills were received by the defendant in 1979 and the drawer of the said bills was the plaintiff. The proceeds from these bills were credited to the account of NKM Holdings Sdn. Bhd. in 1979 and the account number of NKM Holdings Sdn. Bhd. is 55-5363.

The plaintiff opened a current account with the defendant after the plaintiff's board of directors had passed a resolution to that effect. The resolution dated 30 June 1979 is reproduced below:

> Director's Circular Resolution Made Pursuant to Article 93 of the Company's Articles of Association
>
> Opening of Resolved that the directors are hereby authorised to open a current

Bank Account: account in the name of the company with Bank Buruh (M) Bhd., Jalan Gereja, Kuala Lumpur.

That the authorised signatories be jointly Dr. K.S. Nijhar and Mr. N. Krishnamurthy.

That this resolution be communicated to the bank.

Board of Directors

Sgd. (Dr. K.S. Nijhar)

Sgd. (N. Krishnamurthy)

Kuala Lumpur

Dated this 30 of June 1979.

The plaintiff's current account number as stated in the statement of claim is 55-5464.

There is no evidence before me that the plaintiff had authorised the defendant to credit the said bills to the account of NKM Holdings Sdn. Bhd. in 1979. Since the defendant was only authorised to credit all bills negotiated under NKM Trading Sdn. Bhd. to the account of NKM Holding Sdn. Bhd. on 3 March 1980, the defendant had credited the eleven bills to NKM Holdings Sdn. Bhd. without any authorisation by the plaintiff.

Mr. Rekhraj, Counsel for the defendant submitted that Mr. Krishnamurthy who wrote the letter dated 3 March 1980 was at the material times the managing director of the plaintiff as well as the managing director of NKM Holdings Sdn. Bhd. He referred to Article 92 of the Articles of Association of NKM Holding where it is stated that Mr. Krishnamurthy was appointed permanent chairman and managing director of NKM Holdings Sdn. Bhd. for life. He also referred to the memorandum and articles of association of NKM Holdings Sdn. Bhd. for life. He also referred to the memorandum and articles of association of NKM Trading Sdn. Bhd. He submitted that this case involved lifting the corporate veil. According to him whether or not the corporate veil would be lifted was a question of fact which must be decided at the trial. According to the notice of appeal filed by the plaintiff, it appears that the Senior Assistant Registrar refused to order summary judgment "... on the grounds that the corporate veil must be lifted."

I must state here that the corporate veil of a company is lifted in cases involving fraud, restraint of trade or in cases involving enemy property. The Court will lift the veil if justice demands it. See *Bank Bumiputra Malaysia Bhd. & Anor. v. Lorrain Osman & Ors*. [1985] CLJ (Rep) 409 at pp. 420 & 421. In *Aspatra Sdn. Bhd. & 21 Ors. v. Bank Bumiputra Malaysia Bhd. & Anor*. [1987] CLJ (Rep) 50, the Supreme Court held that the Court would generally lift the corporate veil in order to do justice particularly where an element of fraud was involved. The Supreme Court decided that there was admittedly an element of fraud in the receipt of secret profits alleged in that case, and that was sufficient for the Court to lift the corporate veil for the purpose of determining whether the assets of the company were really owned by them.

There is no evidence before me to justify the lifting of the corporate veil. Indeed the question of lifting the corporate veil does not arise at all in this case.

Both NKM Trading Sdn. Bhd. and NKM Holdings Sdn. Bhd. are two separate companies each having its own memorandum and articles of association. NKM Trading Sdn. Berhad may be a subsidiary of NKM Holdings Sdn. Bhd. and Mr. Krishnamurthy may be the

managing director in both companies but in law both companies are two separate entities. See *People's Insurance Co. (M) Sdn. Bhd. v. People's Insurance Co. Ltd. & Ors.* [1986] 1 MLJ 68 at 69, where I said:

> the plaintiff company is a legal entity by itself. Although it is a subsidiary of the first defendant company, the plaintiff company maintains its own separate entity.

For the reasons stated above, it is clear that the defendant had credited the proceeds of the eleven bills which belonged to the plaintiff to NKM Holdings Sdn. Bhd., a separate legal entity without prior authorisation by the plaintiff. The defendant is therefore liable to pay the plaintiff all the proceeds of the eleven bills.

In the circumstances I allow the appeal with costs and order that summary judgment be entered against the defendant in terms of prayers (a), (b) and (c) as contained in the statement of claim.

Also found at [1991] 1 CLJ 563